

O

1  
2  
3  
4  
5  
6  
7  
8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
10

11 RUSSELL BERNARDINI, ) NO. CV 08-8150-JVS (MAN)  
12 )  
13 Plaintiff, ) MEMORANDUM AND ORDER DISMISSING  
14 )  
15 v. ) FIRST AMENDED COMPLAINT WITH LEAVE  
16 )  
17 BRIAN HAWS, et al., ) TO AMEND  
18 )  
19 Defendants. )  
20 )  
21 )  
22 )  
23 )  
24 )  
25 )  
26 )  
27 )  
28 )

18 Plaintiff, proceeding *pro se* and *in forma pauperis*, filed a civil  
19 rights complaint, pursuant to 42 U.S.C. § 1983, on December 15, 2008.  
20 Plaintiff filed a First Amended Complaint on December 16, 2008.  
21

22 Congress has mandated that courts perform an initial screening of  
23 *in forma pauperis* actions.<sup>1</sup> This Court may dismiss an *in forma pauperis*  
24 civil rights action before service of process if it concludes that the  
25 complaint is frivolous, fails to state a claim upon which relief can be  
26

27 <sup>1</sup> Although plaintiff's claims arose while he was incarcerated,  
28 he was released on parole before he commenced this action. (First  
Amended Complaint at 29.) Thus, the First Amended Complaint is not  
subject to the screening provisions of 28 U.S.C. § 1915A, which apply  
to prisoners only.

1 granted, or seeks relief against a defendant who is immune. 28 U.S.C.  
 2 §§ 1915(e)(2). In screening such a complaint, the Court must construe  
 3 the allegations of the complaint liberally and must afford the plaintiff  
 4 the benefit of any doubt. See Karim-Panahi v. Los Angeles Police Dep't,  
 5 839 F.2d 621, 623 (9th Cir. 1988). A *pro se* litigant must be given  
 6 leave to amend his or her complaint unless it is absolutely clear that  
 7 the deficiencies of the complaint cannot be cured by amendment. *Id.*;  
 8 Noll v. Carlson, 809 F.2d 1446, 1448 (9th Cir. 1987).

#### 9 10 **ALLEGATIONS OF THE FIRST AMENDED COMPLAINT**

11  
 12 Plaintiff's claims arose while he was incarcerated at the  
 13 California State Prison-Los Angeles County at Lancaster ("CSP-LAC").  
 14 (First Amended Complaint at 4.) Plaintiff sues the following CSP-LAC  
 15 officials: Warden Brian Haws; former Warden C.M. Harrison; Correctional  
 16 Officers T.L. Hayes, Kenneth Thomas, James Gentry, and Ibanez; Sergeant  
 17 Jameson; John Doe Nos. 1, 2, 3; 7, 8, 9, 10, and 14; Jane Roe Nos. 4,  
 18 12, and 13;<sup>2</sup> and Correctional Counselor Jackson. (*Id.* at 5-11.)  
 19 Plaintiff also names as defendants the following state officials:  
 20 Matthew Cate, Secretary of the California Department of Corrections and  
 21 Rehabilitation ("CDCR"); and Jeanne Woodford, former director of the  
 22 California Department of Corrections ("CDC"), the CDCR's predecessor  
 23 agency. (*Id.* at 8, 9.)

24  
 25 Plaintiff asserts three claims for relief. Claims One and Two  
 26

---

27  
 28 <sup>2</sup> Plaintiff refers to a Jane Roe No. 11 in the body of the First  
 Amended Complaint, but she is not listed as a defendant.

1 arise under the Eighth Amendment. (First Amended Complaint at 12, 14.)  
2 Claim Three purports to assert a claim under the Racketeer Influenced  
3 and Corrupt Organizations Act ("RICO"). (*Id.* at 27, 30-31, 32.) Claim  
4 Three also may be liberally construed to assert a retaliation claim.  
5 (*Id.* at 25.) Plaintiff seeks damages. (*Id.* at 31.)

6  
7 *Claim One:*

8  
9 Plaintiff alleges that, on December 7, 2004, Correctional Officer  
10 Hayes twice slammed plaintiff's head against a concrete wall, causing  
11 him severe pain. (First Amended Complaint at 12.) Sergeant Jameson and  
12 John Doe Nos. 1, 2, and 3 were present, but did not stop the assault  
13 until Sergeant Jameson said, "Okay, that's enough." (*Id.* at 12, 17-18.)  
14 The assault happened as defendants Jameson and Hayes were escorting  
15 plaintiff, who had requested a cell move; Hayes told plaintiff that he  
16 was causing problems by requesting the move, slammed his head against  
17 the wall, and told him to return to his cell. (*Id.* at 12, 18, 19.)  
18 Plaintiff contends that Sergeant Jameson, as Hayes' supervisor, had a  
19 duty to stop Hayes from assaulting plaintiff. (*Id.* at 13.) Plaintiff  
20 fears that he has sustained a permanent head injury. (*Id.* at 16.-17)

21  
22 Plaintiff alleges that, after he filed an administrative appeal,  
23 Sergeant Jane Roe No. 4 failed to adequately investigate the incident  
24 and engaged in a cover-up by intimating in her response to his appeal  
25 that there was no evidence the incident actually happened. (First  
26 Amended Complaint at 13, 18-19, 19-22.) According to plaintiff, there  
27 were witnesses to the incident, and he speculates that it may have been  
28 captured on a hidden video camera. (*Id.* at 17, 19-20.) Plaintiff

1 argues that Jane Roe No. 4 either did not interview the witnesses or  
2 falsified her response to plaintiff's administrative appeal by  
3 misreporting what they said. (*Id.* at 20.) He contends that Secretary  
4 Cate, former Director Woodford, Warden Haws, former Warden Harrison, and  
5 John Doe Nos. 7 through 10 are responsible for this failure to  
6 investigate and alleged cover-up. (*Id.* at 13-14, 21-22.)

7  
8 *Claim Two:*

9  
10 Plaintiff alleges that, on December 16, 2004, Correctional Officers  
11 Thomas and Gentry pushed him down onto his knees and slammed his head  
12 and upper torso against the concrete floor. (First Amended Complaint  
13 at 14, 23.) Thomas and Gentry then got down alongside plaintiff and  
14 started to punch him on the back of his head. (*Id.* at 24.) Plaintiff  
15 suffered pain and bumps and abrasions on his nose, face, and knee. (*Id.*  
16 at 23-24.) Lieutenant Jane Roe No. 11 interviewed plaintiff about the  
17 incident and his injuries were videotaped. (*Id.*)

18  
19 *Claim Three:*

20  
21 Plaintiff alleges that some of the defendants retaliated against  
22 him for pursuing an administrative appeal against his substance abuse  
23 instructor. (First Amended Complaint at 25.) Plaintiff had complained  
24 that a story told by the substance abuse instructor in class about  
25 shutting up her niece's dog in the girl's room, with predictable  
26 results, demonstrated abusive behavior towards the niece. (*Id.* at 25.)  
27 On or about November 3, 2004, shortly before plaintiff's annual  
28 classification hearing, the instructor's supervisor, Jane Roe No. 13,

1 met with plaintiff's Correctional Counselors, defendants Jackson and  
2 John Doe No. 14, "possibly to tell" them to remove plaintiff from the  
3 substance abuse program. (*Id.* at 25-26.)  
4

5 On February 3, 2005, defendants Thomas and Ibanez escorted  
6 plaintiff to the infirmary. (First Amended Complaint at 26.) They took  
7 him to a room, closed the door, turned off the lights, and Thomas pulled  
8 out his baton.<sup>3</sup> (*Id.* at 15, 26.) They threatened to kill plaintiff  
9 unless he ceased prosecuting his previous action in this Court and also  
10 ceased pursuing his administrative appeal based on the December 16, 2004  
11 incident. (*Id.* at 27.) However, Thomas never actually hit plaintiff  
12 with the baton. (*Id.* at 26-27.)  
13

14 On February 5, 2005, defendant Thomas came to plaintiff's cell and  
15 offered him a pair of used tennis shoes if plaintiff would drop his  
16 administrative appeal. (First Amended Complaint at 15, 27.) Plaintiff  
17 contends that these efforts to persuade him to cease pursuing his  
18 lawsuit and grievances violated RICO. (*Id.* at 27.)  
19

## 20 DISCUSSION

### 21 22 I. PLAINTIFF MUST NAME ALL DEFENDANTS IN THE CAPTION OF THE COMPLAINT.

23  
24 The caption of the First Amended Complaint lists only one  
25

---

26 <sup>3</sup> Plaintiff variously describes this incident as occurring on  
27 February 3, 2005, and February 12, 2005. (First Amended Complaint at  
28 15, 26.) Plaintiff should clarify the correct date in his Second  
Amended Complaint.

1 defendant, Brian Haws. (First Amended Complaint at 1). Rule 10(a) of  
2 the Federal Rules of Civil Procedure requires that the name of each  
3 defendant be included in the caption of the complaint. Fed. R. Civ.  
4 P. 10(a); see also Ferdik v. Bonzelet, 963 F.2d 1258, 1262-63 (9th Cir.  
5 1992); Local Rule 11-3.8. If plaintiff files a Second Amended  
6 Complaint, he must list in the caption the names of all defendants  
7 against whom he is asserting a claim, including the fictitious (Doe or  
8 Roe) defendants whose names he does not yet know.

9  
10 **II. PLAINTIFF'S EIGHTH AMENDMENT CLAIMS AGAINST DEFENDANTS HAYES,**  
11 **JAMESON, THOMAS, AND GENTRY WITHSTAND SCREENING.**

12  
13 At this early stage of the action, the Court concludes that the  
14 following claims in the First Amended Complaint withstand screening:  
15 (1) plaintiff's Eighth Amendment excessive force claim against defendant  
16 Hayes based on the December 7, 2004 incident; (2) plaintiff's Eighth  
17 Amendment failure to protect claim against defendant Jameson based on  
18 the December 7, 2004 incident; and (3) plaintiff's Eighth Amendment  
19 excessive force claims against defendants Thomas and Gentry based on the  
20 December 12, 2004 incident. However, plaintiff must re-allege these  
21 claims, and the supporting factual allegations, in the Second Amended  
22 Complaint, if he still wishes to pursue them.

23  
24 **III. PLAINTIFF FAILS TO STATE A CLAIM AGAINST DEFENDANTS CATE, WOODFORD,**  
25 **HAWS, AND HARRISON.**

26  
27 Section 1983 provides, in pertinent part, that "[e]very person who,  
28 under color of any statute . . . subjects, or causes to be subjected,

1 any . . . person . . . to the deprivation of any rights, privileges, or  
2 immunities secured by the Constitution and laws, shall be liable to the  
3 party injured." 42 U.S.C. § 1983. As defined by the courts, a person  
4 "subjects" another to the deprivation of a constitutional right, within  
5 the meaning of Section 1983, if he or she does an affirmative act,  
6 participates in another's affirmative act, or omits to perform an act  
7 which he or she is legally required to do that causes the complained-of  
8 deprivation. Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978).

9  
10 A supervisory official is liable only if he or she was personally  
11 involved in the constitutional deprivation, or if there is a sufficient  
12 causal connection between the supervisor's wrongful conduct and the  
13 constitutional violation. Jeffers v. Gomez, 267 F.3d 895, 915 (9th Cir.  
14 2001); Redman v. County of San Diego, 942 F.2d 1435, 1446-47 (9th Cir.  
15 1991); see Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989) ("A  
16 supervisor is only liable for constitutional violations of his  
17 subordinates if the supervisor participated in or directed the  
18 violations, or knew of the violations and failed to act to prevent  
19 them."); Cunningham v. Gates, 229 F.3d 1271, 1292 (9th Cir. 2000)  
20 (supervisors can be held liable for own culpable action or inaction in  
21 the training, supervision, or control of subordinates, or their  
22 acquiescence in a constitutional deprivation, or for other conduct  
23 showing reckless or callous indifference to the rights of others).

24  
25 Plaintiff has named as defendants the following supervisory  
26 officials: Matthew Cate, the current CDCR Secretary; Jeanne Woodford,  
27 former CDC director; Brian Haws, current CSP-LAC warden; and C.M.  
28 Harrison, former CSP-LAC warden. (First Amended Complaint at 8, 9.)

1 Plaintiff does not contend that these defendants personally participated  
2 in the incidents giving rise to his claims. Rather, he considers them  
3 responsible for a purportedly inadequate investigation of the December  
4 8, 2004 incident by Jane Roe No. 4, who is alleged to have implied  
5 falsely in her response to plaintiff's grievance that there was no  
6 evidence the incident actually happened. (First Amended Complaint at  
7 8, 9, 21-22.) Even assuming, *arguendo*, that these factual allegations  
8 could constitute a basis for a Section 1983 claim as against Jane Roe  
9 No. 4, plaintiff has not alleged any factual basis for imposing  
10 liability on the supervisory defendants.<sup>4</sup> See Jeffers, 267 F.3d at 915;  
11 Redman 942 F.2d at 1446-47; Taylor, 880 F.2d at 1045.

12  
13 Furthermore, plaintiff's allegations regarding the purportedly  
14 inadequate investigation of the incident, and the alleged misstatements  
15 in the response to his grievance, are insufficient to support a Section  
16 1983 claim against any defendant.<sup>5</sup> It is well settled that a prisoner  
17 cannot state a due process claim based on the processing of his  
18 grievances. See Ramirez v. Galaza, 334 F.3d 850, 860 (9th Cir.  
19 2003)("inmates lack a separate constitutional entitlement to a specific  
20

---

21 <sup>4</sup> In addition, the Court takes judicial notice that Matthew Cate  
22 was appointed as CDCR Secretary on May 16, 2008. See  
23 [www.cdcr.ca.gov/About\\_CDCR/cate.html](http://www.cdcr.ca.gov/About_CDCR/cate.html). Thus, he did not hold that  
24 position at the time of the assaults on plaintiff or during the ensuing  
25 investigation. Accordingly, there is no factual basis for holding him  
26 liable on any basis arising out of Jane Roe No. 4's alleged conduct.

27 <sup>5</sup> The Court will not screen the sufficiency of plaintiff's  
28 claims as against the fictitious defendants, such as Jane Roe No. 4,  
until after plaintiff has identified these defendants by name. Such  
deferral of screening at this time should not be construed as a finding  
about the cognizability of the claims alleged against the fictitious  
defendants.



1 prison grievance procedure"); Mann v. Adams, 855 F.2d 639, 640 (9th Cir.  
2 1988)("[t]here is no legitimate claim of entitlement to a grievance  
3 procedure"). To the extent plaintiff contends that prison officials  
4 engaged in a cover-up of the December 7, 2004 incident, such allegations  
5 can state a Section 1983 claim only if the cover-up deprived plaintiff  
6 of his right of access to courts by causing him to fail to obtain  
7 redress for the constitutional violation that was the subject of the  
8 cover-up. See Karim-Panahi, 839 F.2d at 625; Rose v. City of Los  
9 Angeles, 814 F. Supp. 878, 881 (C.D. Cal. 1993). A cover-up claim is  
10 premature when, as here, plaintiff's action seeking redress for the  
11 underlying constitutional violations remains pending. See Karim-Panahi,  
12 839 F.2d at 625 (claim alleging police cover-up of misconduct was  
13 premature when action challenging misconduct was pending); Rose, 814 F.  
14 Supp. at 881 (same).

15  
16 Similarly, even assuming that plaintiff's allegations about Jane  
17 Roe No. 4 -- that she "intimated" in her response to his grievance that  
18 there was no evidence of the incident -- can be viewed as alleging that  
19 she made a false statement, making false statements in a report does not  
20 constitute an independent basis for a Section 1983 violation, especially  
21 where, as here, plaintiff has not alleged any resulting injury. See  
22 Hunt v. Jones, 1996 WL 193857, \*1 (N.D. Cal. 1996)(allegations that  
23 police officer prepared a false police report did not state a Section  
24 1983 claim).

25  
26 Accordingly, plaintiff's claims against defendants Cate, Woodford,  
27 Haws, and Harrison must be dismissed.

1 **IV. PLAINTIFF FAILS TO STATE A CLAIM UNDER RICO.**

2  
3 Plaintiff purports to assert a claim under RICO. (First Amended  
4 Complaint at 27, 30, 32.) He contends that defendants Thomas and Ibanez  
5 violated RICO when they attempted, through threats and bribes, to  
6 dissuade him from pursuing his civil rights action and administrative  
7 appeal. (First Amended Complaint at 27.)

8  
9 "To state a civil RICO claim, plaintiffs must allege (1) conduct  
10 (2) of an enterprise (3) through a pattern (4) of racketeering activity  
11 (5) causing injury to plaintiffs' 'business or property.'" Ove v.  
12 Gwinn, 264 F.3d 817, 825 (9th Cir. 2001); see Sedima, S.P.R.L. v. Imrex  
13 Co., 473 U.S. 479, 496, 105 S. Ct. 3275, 3285 (1985); 18 U.S.C. §§  
14 1962(c), 1964(c). To demonstrate injury for RICO purposes, a plaintiff  
15 must show an injury to his business or property; personal injuries are  
16 not compensable under RICO. Ove, 264 F.3d at 825; Oregon Laborers-  
17 Employers Health & Welfare Trust Fund v. Philip Morris Inc., 185 F.3d  
18 957, 963 (9th Cir. 1999). Here, plaintiff's allegations are wholly  
19 insufficient to allege a RICO injury or, indeed, any of the elements of  
20 a RICO claim.

21  
22 Accordingly, plaintiff's RICO claim must be dismissed.

23  
24 **V. PLAINTIFF FAILS TO STATE A RETALIATION CLAIM AGAINST ANY DEFENDANT.**

25  
26 Liberally construed, Claim Three asserts a retaliation claim as  
27 well as a RICO claim. (See First Amended Complaint at 25.)  
28

1 In the prison context, "a viable claim of First Amendment  
2 retaliation entails five basic elements: (1) An assertion that a state  
3 actor took some adverse action against an inmate (2) because of (3) that  
4 prisoner's protected conduct, and that such action (4) chilled the  
5 inmate's exercise of his First Amendment rights, and (5) the action did  
6 not reasonably advance a legitimate correctional goal." Rhodes v.  
7 Robinson, 408 F.3d 559, 567-68 (9th Cir. 2005)(*internal footnote*  
8 *omitted*); see also Pratt v. Rowland, 65 F.3d 802, 806 (9th Cir. 1995);  
9 Barnett v. Centoni, 31 F.3d 813, 815-16 (9th Cir. 1994); Rizzo v.  
10 Dawson, 778 F.2d 527, 532 (9th Cir. 1985). Adverse action is action  
11 that "would chill a person of ordinary firmness" from engaging in that  
12 activity. Pinard v. Clatskanie School District, 467 F.3d 755, 770 (9th  
13 Cir. 2006); White v. Lee, 227 F.3d 1214, 1228 (9th Cir. 2000).  
14 Plaintiff has the burden of demonstrating that his exercise of his First  
15 Amendment rights was the substantial or motivating factor behind  
16 defendants' conduct. Mt. Healthy City School Dist. Bd. of Educ. v.  
17 Doyle, 429 U.S. 274, 287, 97 S. Ct. 568, 576 (1977); Soranno's Gasco,  
18 Inc. v. Morgan, 874 F.2d 1310, 1314 (9th Cir. 1989). Plaintiff also  
19 bears the burden of pleading and proving the absence of legitimate  
20 correctional goals for the conduct of which he complains. Pratt, 65  
21 F.3d at 806.

22  
23 Here, plaintiff alleges that the purported retaliation was  
24 motivated by a grievance he filed about his substance abuse instructor.  
25 (Complaint at 26.) However, plaintiff does not clearly describe the  
26 allegedly adverse acts, or even who committed them. Plaintiff alleges  
27 only that, shortly before his annual classification hearing, Jane Roe  
28 No. 13, who was the substance abuse instructor's supervisor, met with

1 his Correctional Counselors, defendants Jackson and John Doe No. 14,  
2 "possibly" to tell them to "fire or unassign" plaintiff from his  
3 substance abuse assignment. (First Amended Complaint at 26.) Apart  
4 from plaintiff's failure to allege that this discussion actually  
5 occurred (instead of "possibly" occurred), plaintiff does not allege  
6 that he was in fact removed from the substance abuse program, or (if he  
7 was) the reasons given for his removal. Moreover, even if plaintiff was  
8 removed from the program, he does not does not allege that the decision  
9 to remove him was made by these defendants. Thus, plaintiff has not  
10 adequately alleged either adverse acts by the defendants, or retaliatory  
11 motivation on their part, or absence of legitimate correctional goals.  
12 See Rhodes, 408 F.3d at 567-68.

13  
14 Accordingly, plaintiff's retaliation claim must be dismissed.  
15 Because this is the only claim plaintiff asserts against defendant  
16 Jackson, unless plaintiff can rectify its deficiencies, he should not  
17 include Jackson as a defendant in the Second Amended Complaint.

18  
19 **VI. PLAINTIFF FAILS TO STATE A CLAIM AGAINST DEFENDANT IBANEZ.**

20  
21 Plaintiff contends that defendants Thomas and Ibanez threatened to  
22 kill him if he did not withdraw his grievance regarding the December 16,  
23 2004 incident. (First Amended Complaint at 15, 26-27.) These  
24 allegations are the sole basis for plaintiff's claim against defendant  
25 Ibanez.

26  
27 According to plaintiff, this conduct by defendants Thomas and  
28 Ibanez violated RICO. (First Amended Complaint at 27.) As already

1 discussed, these allegations cannot support a RICO claim under any  
2 cognizable legal theory. See Balistreri v. Pacifica Police Dep't, 901  
3 F.2d 696, 699 (9th Cir. 1988). However, even if the Court liberally  
4 construes plaintiff's allegations to assert a constitutional claim, the  
5 claim is fatally defective because mere threats are not constitutionally  
6 prohibited. See Gaut v. Sunn, 810 F.2d 923, 925 (9th Cir. 1987)  
7 (allegations that guards threatened prisoner with bodily harm to  
8 persuade him to cease pursuing legal redress did not state a cause of  
9 action under Section 1983).

10  
11 Accordingly, plaintiff has not alleged any basis for a Section 1983  
12 claim against defendant Ibanez. Unless plaintiff can rectify these  
13 deficiencies, he should not include Ibanez as a defendant in the Second  
14 Amended Complaint.

15  
16 **VII. PLAINTIFF FAILS TO STATE A CLAIM AGAINST DEFENDANTS IN THEIR**  
17 **OFFICIAL CAPACITIES.**

18  
19 Plaintiff has sued all defendants in their official as well as  
20 individual capacities. (First Amended Complaint at 5-11.)

21  
22 Official capacity claims against state officials are merely another  
23 way of pleading a claim against the state itself. See Will v. Michigan  
24 Dep't. of State Police, 491 U.S. 58, 71, 109 S. Ct. 2304, 2312  
25 (1989)("[A] suit against a state official in his or her official  
26 capacity is not a suit against the official but rather is a suit against  
27 the official's office. As such, it is no different from a suit against  
28 the State itself." (*internal citation omitted*)). The Eleventh Amendment

1 prohibits federal jurisdiction over claims against a state unless the  
2 state has consented to suit or Congress has abrogated the state's  
3 immunity. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 99-  
4 100, 104 S. Ct. 900, 107-08 (1984). The State of California has not  
5 consented to be sued under Section 1983 in federal court, and the  
6 Supreme Court has held that Section 1983 was not intended to abrogate  
7 a state's Eleventh Amendment immunity. Dittman v. California, 191 F.3d  
8 1020, 1025-26 (9th Cir. 1999); see Kentucky v. Graham, 473 U.S. 159, 169  
9 n.17, 105 S. Ct. 3099, 3107 n.17 (1985). Thus, official capacity claims  
10 for damages are barred by the Eleventh Amendment. Dittman, 191 F.3d at  
11 1026 ("[t]he Eleventh Amendment bars actions for damages against state  
12 officials who are sued in their official capacities in federal court").  
13 In addition, the Supreme Court has held that a state official sued in  
14 his official capacity is not "a person" subject to suit under Section  
15 1983 for purposes of a suit for damages. Will, 491 U.S. at 71 & n. 10,  
16 109 S. Ct. at 2312 & n.10.

17  
18 Accordingly, plaintiff's official capacity claims against  
19 defendants must be dismissed.

#### 20 21 CONCLUSION

22  
23 For the foregoing reasons, the First Amended Complaint is dismissed  
24 with leave to amend. If plaintiff wishes to pursue this action, he is  
25 granted thirty (30) days from the date of this Memorandum and Order  
26 within which to file a Second Amended Complaint that attempts to cure  
27 the defects in the First Amended Complaint described herein. The Second  
28 Amended Complaint, if any, shall be complete in itself. It shall not

refer in any manner to the First Amended Complaint or the original Complaint. **Plaintiff may not add new claims or new defendants without obtaining prior leave of court. Fed. R. Civ. P. 15(a).**

Plaintiff is explicitly cautioned that failure to timely file a Second Amended Complaint, or failure to correct the deficiencies described herein, may result in a recommendation that this action be dismissed pursuant to Fed. R. Civ. P. 41(b).

DATED: April 2, 2009

/s/  
MARGARET A. NAGLE  
UNITED STATES MAGISTRATE JUDGE